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Brief of Putnam for Appt

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SUPREME COURT OF THE UNITED STATES

No. 790

OCTOBER TERM, 1895

THE FRANKLIN SUGAR REFINING COMPANY
Libellant-Appellant

vs.

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE
Claimant-Appellee

BRIEF FOR LIBELLANT IN SUPPORT OF PETITION FOR CERTIORARI

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Advocate

SUPREME COURT OF THE UNITED STATES

THE FRANKLIN SUGAR REFINING COMPANY, Libellant-Appellant, AGAINST The Steamship SILVIA, her engines, etc., RED CROSS LINE, Claimant-Appellee.	On Petition for certiorari to bring up record.

BRIEF FOR LIBELLANT IN SUPPORT OF PETITION

This suit was brought against the British steamship *Silvia* in the District Court of the United States for the Southern District of New York, to recover $4,805.66 for damage to a cargo of sugar shipped at Matanzas, Cuba, and delivered in Philadelphia in February, 1894.

The bill of lading acknowledges the shipment in "good order and well conditioned," and contains no exception but the "dangers of the seas."

"The cargo was injured by sea water which came through a port in one of the compartments of the between-decks which had been recently fitted up to carry steerage passengers, but which at the time was only used for the storage of ropes and extra gearing. The port was one of several in the compartment, was of the diameter of eight inches, was furnished with a heavy glass cover set in a brass frame, and also with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden."

Opinion of Circuit Court of Appeals, Record, p. 71.

The steamship sailed from Matanzas in the early morning of February 16th. In the afternoon of the same day the engineer reported water in the engine room, which, after a search, was found to be coming through one of the ports in the between-decks, the glass cover of which had been broken, by what cause does not appear. The master says, "no sea could have broken it, as it was too high up." (Record, fol. 78.) The suggestion that it may have been broken by wreckage, is a mere conjecture. No wreckage came through the port; none was found in the steerage; none was reported to the officers; and none was seen by any one on the steamer. (Record, fols. 86–7 and 159–60.)

The District Judge found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports"; but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893; and (4) that the omission to close the dummy was a fault or error in the management of the vessel within the terms of the act.

Opinion of District Court, Record, pp. 63–5.

The Circuit Court of Appeals affirmed the decision of the District Court, holding that the case was controlled by the Act of February 13, 1893, and that "its provisions relieved the steamship from liability."

Opinion of Circuit Court of Appeals, Record, pp. 71–6.

It is respectfully submitted that the lower Courts erred in sustaining this defence.

POINTS.

I.—The negligence of the ship was abundantly established.

The case is a much stronger one than the *Majestic*, now in this Court by *certiorari*, in which both the District Court and the Circuit Court of Appeals held the ship guilty of negligence for damage done through a broken port.

56 Fed. R., 244; on appeal, 60 Fed. R., 624.

II.—The steamship sailed from Matanzas in an unseaworthy condition.

This the learned District Judge expressly found: "Although the ship sailed from Matanzas not in a seaworthy condition from the fact that the hatches were battened down without the closing of the iron coverings of the ports," etc.

Opinion, fol. 255.

The two facts of open dummies, and the hatch battened down so that no one could inspect the condition of the between-decks from time to time, and shut the dummies if necessary, rendered the ship unseaworthy.

The Circuit Court of Appeals did not agree with the District Judge in this, for the reason that it thought "it would have been but the work of a few moments to unbatten the hatch of the compartment," and close the ports with the iron covers. (Record, fol. 287). This conclusion is not sustained by the evidence.

No. 1 between decks had no cargo; it contained only a few ropes and stores (fol. 110). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, fols. 183–4).

The hatch of this No. 1 between-decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage other than the hatch (fols. 111–2).

The hatch was battened down for the purpose of preventing access to the between-decks, there being nothing there which was wanted in the ordinary course of the voyage from Matanzas to Philadelphia.

Clark, master, fols. 105, 106.
Nicholson, fols. 126, 148.

In the case of Steele *v.* State Line S. S. Co. (L. R., 3 App. Cas., 72), cited in the opinion of the Circuit Court of Appeals, Lord Blackburn put a case entirely analagous to the present as follows:

"If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done; if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic" (p. 90).

The learned District Judge, whose experience in admiralty cases is very great, knew what it meant to batten down a hatch. The very purpose of doing this is to prevent easy access to the hold, and it needs no testimony to show that if rough weather came on it would be a very dangerous thing to attempt to open the hatch.

If the No. 1 between-decks of the *Silvia* had been in use as a steerage, as it was subsequently, and if, as the captain puts it, a steward was "going up and down there all the time," there would be no reason

why the dummies should not be open; but to batten down the hatch and leave the dummies open was to make the vessel unseaworthy, that is, unfit to encounter the perils of the voyage.

If the attendance of persons to watch for changes of weather was necessary as a condition of using the ports, provision by the owners for such attendance was essential to make the vessel seaworthy. The owners had no right to cut a dangerous opening in the ship's side, and then say that because they had placed near it an appliance which could be used to make it safe, but which required the attendance of some one especially charged with the duty of using it, they had fulfilled their obligations, unless they have in fact assigned such a person to that special duty. Many steamers have cargo ports in their sides, and lumber vessels have ports in the bows, which are kept closed by bolts and fastenings which require caulking or rubber packing to make them watertight. Would such a vessel be seaworthy if her owner had provided a bale of oakum and tools to use it, if they had not in fact been used?

Apart from this circumstantial unseaworthiness, if it may be so called, the *Silvia* was unseaworthy in the ordinary sense of the word. The glass port itself was manifestly insufficient even in fine weather. It gave way without any stress of weather or extraordinary cause. The port should have been of sufficient strength in its original construction to withstand the pressure of ordinary seas. Nothing extraordinary occurred. Yet it gave way. This is unseaworthiness.

III.—The question presented on this application is whether a vessel leaving port in an unseaworthy condition, is relieved by the act of Congress of February 13, 1893, from liability for damage to cargo, resulting from such unseaworthiness.

The third section of the act provides

"That if the owner of any vessel transporting mer-

chandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

27 Stat. at L., c. 105, p. 445.

1. The Circuit Court of Appeals held that the case was "controlled by the act of Congress, and that its provisions relieved the steamship from liability."

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the ship owner as a carrier of goods by the pre-existing law as it had been declared by the courts."

Opinion, fol. 293.

It cited the cases of the *Edwin I. Morrison* (153 U. S., 199) and the *Caledonia* (157 U. S., 124), as to the absolute nature of the warranty of seaworthiness, and said:

"In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy neither he nor the vessel is to be responsible for damages or loss in transporting merchandise resulting from 'faults or errors in her navigation or management;' nor for losses arising from dangers of the sea."

Opinion, fol. 297.

2. In the recent case of Dobell & Co. *v.* S.S. Rossmore Company, Limited, [1895] 2 Q. B., 408, goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not water-tight. The ship relied on the act of Congress of February 13, 1893, which was incorporated in the bill of lading, as a defence. "The appliances for closing the port holes were sufficient and in good

order, and the competency of the ship's carpenter for the duties he had to perform was not disputed." The trial judge gave judgment for the plaintiffs, and in the Court of Appeal the defendant's appeal was dismissed, the Master of the Rolls and the Lords Justices Kay and A. L. Smith delivering the judgments.

Lord Esher said:

"It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3d section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpenter he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf the owner, to see to the fulfillment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started."

Thus on facts substantially similar, the Circuit Court of Appeals for the Second Circuit has exonerated the *Silvia* from liability, and the English Court of Appeal has held the *Rossmore* liable.

In view of this difference between the English Court of Appeal and our own intermediate courts as to the extent of the obligation of seaworthiness, it is important to obtain a decision from this Court on this question as speedily as possible.

3. This Court has at the present term granted a writ of *certiorari* in the case of Wupperman *v.* the *Carib Prince*, involving the second section of the act of February 13, 1893. The decision of this Court in that

case, however, will leave still unsettled the interpretation of the third section of the act, which is raised by the present application.

In the case of the *Carib Prince* the bill of lading excepted injuries from latent defects. The libellants, in order to overcome this express exception, relied on the second section of the Harter bill, which provides that it shall not be lawful for any vessel transporting merchandise, etc., to insert in a bill of lading any covenant or agreement "whereby the obligations of the vessel owner to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in any wise be lessened, weakened or avoided."

In the present case it is the ship, not the merchant, which claims the benefit of the Harter bill, relying on the third section of the act, which provides that if the vessel owner shall exercise due diligence to make the said vessel in all respects seaworthy, the vessel shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.

4. Many actions are pending in this district and other districts in which the defence rests upon the validity and interpretation of the third section of the act. Large interests depend on the determination of the question.

The question is of so great consequence to shipowners and merchants that it should be passed upon by the Supreme Court.

IV.—A writ of *certiorari* should be granted herein.

November, 1895.

WING, PUTNAM & BURLINGHAM,
Proctors for Petitioner.

HARRINGTON PUTNAM,
Advocate.